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In The
Supreme Court of the United States

JALIL ABDUL-KABIR, formerly known as
TED CALVIN COLE,

Petitioner,

v.

NATHANIEL QUARTERMAN,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

REPLY BRIEF FOR PETITIONER

ROBERT C. OWEN
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton
Austin, TX 78705
(512) 232-9391
*Counsel of Record
for Petitioner*

RAOUL D. SCHONEMANN
3774 Harrison Street
Oakland, CA 94611
(510) 654-1192

JORDAN M. STEIKER
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton
Austin, TX 78705
(512) 232-1346

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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A. Respondent declines to defend the rationale of the state courts' decision denying relief under *Penry v. Lynaugh*, 492 U.S. 302 (1989), but fails to explain how jurors could have concluded that the relevant mitigating qualities of Mr. Cole's childhood neglect and deprivation, resulting mental and emotional disorders as an adult, neurological dysfunction, and diminished impulse control supported a "no" answer to the future dangerousness issue.

In his opening brief, Mr. Cole[1] explained in detail why the rejection of his *Penry* claim by the Texas Court of Criminal Appeals ("CCA"), entangled as it was with longstanding Texas caselaw enforcing the "nexus" and "severity" conditions later struck down by this Court in *Tennard v. Dretke,* 542 U.S. 274 (2004), was objectively unreasonable in light of then-existing clearly established Federal law, such that this Court should intervene and correct it under 28 U.S.C. § 2254(d). *See* Brief for Petitioner ("PB") 39-49. Respondent denies that the state courts applied any such "nexus" and "severity" tests. *See* Brief of Respondent ("RB") 41 (asserting that the "terms [nexus and severity] do not appear in the [state] court's findings").[2] Further, Respondent states that he need not

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[1] All relevant court documents and records in this case refer to Petitioner Jalil Abdul-Kabir by his former name, Ted Calvin Cole. With Mr. Abdul-Kabir's permission, this brief will call him "Mr. Cole."

[2] Respondent is understandably reluctant to acknowledge the actual basis of the state courts' decision. As we have demonstrated, *see* PB 40-42 and accompanying notes, the cases cited by the state courts in rejecting Mr. Cole's *Penry* claim apply precisely the "nexus" and "severity" limitations this Court forcefully rejected in *Tennard*. Indeed, one of the cases cited in *Cole – Mines v. State*, 888 S.W.2d 816 (Tex. Crim. App. 1994) – is among those *Respondent* has previously cited to this Court to show how the CCA routinely foreclosed *Penry* claims on

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defend the CCA's reasoning to prevail under § 2254(d) in any event, because only the state court's "ultimate decision" need be "tested for unreasonableness"; its "reasoning is inapposite." *Id.*[3] Thus, at the same time that Respondent

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nexus and severity grounds. *See* Brief of Respondent, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002) at 28-29 (citing *Mines* as illustrating the CCA's rule that "Mitigating evidence that fails to meet these criteria [*i.e.*, that does not show "an involuntary, permanent, and severe disability that was directly connected to the crime," *id.*] is not relevant to moral culpability. . . .").

[3] Respondent cites several cases for its claim that a state court's reasoning is irrelevant under § 2254(d), *see* RB 14, but most of them do not support it. For example, *Saiz v. Ortiz*, 392 F.3d 1166, 1176 (10th Cir. 2004), notes that the Tenth Circuit has not followed the practice of looking solely to the state court's result "where the state court's explicit reasoning contravenes Supreme Court precedent." *Saiz*, 392 F.3d at 1176 (citation omitted); *see also, e.g., Stevens v. Ortiz*, 465 F.3d 1229, 1235 (10th Cir. 2006) ("When we review a summary disposition by a state court, we focus on its result rather than any reasoning," citing *Saiz*; "[h]owever, when applying AEDPA to fully reasoned opinions . . . , this circuit has not focused solely on the result 'where the state court's explicit reasoning contravenes Supreme Court precedent' "). Similarly, *Wright v. Dept. of Corrections*, 278 F.3d 1245, 1255 (11th Cir. 2002), acknowledges that the Eleventh Circuit had previously held that a federal habeas court should consider whether a state court had "explicitly misapplied" controlling law, because a state court's "failure . . . to set out its reasoning is not equivalent to the conspicuous misapplication of Supreme Court precedent." *Id.* at 1256 n.3 (citation omitted). *Long v. Humphrey*, 184 F.3d 758, 760-61 (8th Cir. 1999), specifically identifies the reasons the state court gave for its challenged action in that case, *see id.* at 761, and in this regard is consistent with subsequent Eighth Circuit cases considering the state court's reasoning as part of the § 2254(d) analysis. *See, e.g., Huss v. Graves*, 252 F.3d 952, 955-56 (8th Cir. 2001) (finding that the state court decision was unreasonable because it "applied the incorrect legal standard to [the petitioner's] case," by relying on particular language in one Supreme Court opinion "to the exclusion of other relevant considerations"). Similarly, Respondent's citation to *Matteo v. Superintendent*, 171 F.3d 877, 891 (3rd Cir. 1999), for this proposition is undermined by later Third Circuit cases assessing a state court's reasoning as part of the § 2254(d) analysis. *See, e.g., Bronshtein v. Horn*, 404 F.3d 700, 723-24

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pointedly refuses to defend the ground on which the CCA actually *did* reject Mr. Cole's *Penry* claim (*i.e.*, by citing to cases suggesting that Mr. Cole's evidence was insufficiently "severe" and lacked a "nexus" to the crime), he also refuses to engage Mr. Cole's argument that his jurors would not reasonably have understood his mitigating evidence to support a "no" answer to the future dangerousness question. Respondent's argument for upholding the Fifth Circuit's judgment endorsing Mr. Cole's death sentence, then, reduces to his weak attacks on Mr. Cole's evidence and the other circumstances we have identified as relevant to the Court's inquiry under *Boyde v. California*, 494 U.S. 370 (1990). It is to those matters that we now turn.

B. Respondent's assertions about Mr. Cole's childhood of neglect and deprivation unreasonably minimize the testimony of Mr. Cole's lay witnesses and ignore the powerful testimony of his experts.

Respondent contends that the Fifth Circuit was correct in holding that Mr. Cole's mitigating evidence of childhood

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(3rd Cir. 2005) (finding state court to have unreasonably applied *Batson*, based on the state court's reasoning "that the record suggested legitimate reasons that could have motivated the prosecutor to exercise the contested peremptory challenge"). These opinions make plain that no such consensus exists among the Circuits that a federal habeas court must ignore the state court's *ratio decidendi*. Any such approach, moreover, would appear to be out of step with this Court's observation that a federal court applying § 2254(d) must decide that neither "*the reasoning nor the result* of the state-court decision contradicts" Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 7-8 (2002) (*per curiam*) (emphasis added); *see also, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (examining the Virginia Supreme Court's reasoning, and not simply the result it reached, on the way to determining that the state court's rejection of Williams' ineffective-assistance claim was objectively unreasonable).

neglect and deprivation was "well within the reach of the jury in answering the future-dangerousness special issue." RB at 33. In so arguing, Respondent strains to diminish the force of Mr. Cole's evidence by focusing exclusively on the lay witnesses' testimony to the exclusion of defense expert testimony, and characterizing the proof as showing only "a neglectful mother and largely absent father." *Id.*

Even the lay testimony showed that Mr. Cole's mother was not just "neglectful," as Respondent mildly puts it. In fact, she was an *alcoholic* who drank so much that she was unable properly to care for her children, and his father not simply "absent" but a criminal who was arrested for robbing a liquor store shortly after Mr. Cole was born and who abandoned the family before he was five. JA 35-36. Mr. Cole's mother turned Mr. Cole over to her parents, *also* alcoholics, who were similarly unable or unwilling to care for him. *Id.* Mr. Cole was then placed in a children's home, where in five years his mother visited him only twice and his father not at all. *Id.* at 37-38, 57. During these years of exile from his family, Mr. Cole was emotionally withdrawn and unexpressive. *Id.* at 57.

But more significant than Respondent's quibbles with the lay mitigation testimony is his failure to confront Mr. Cole's *expert* testimony on the subject of Mr. Cole's upbringing, which told jurors directly and emphatically that Mr. Cole had endured a "very rugged, rough childhood." JA 67; *see also* JA 68 (Mr. Cole showed marks of having experienced "a bad, very painful background"). Jurors heard that Mr. Cole had "never felt loved and worthwhile in his life," so much so that he exhibited "terrific needs for nurturance," a "fragmented personality" and "chronic depression." JA 67, 86; *see also* JA 73 (the cumulative impact of Mr. Cole's life experience left his personality

"very damaged" and "horribly" distorted).[4] Reasonable jurors, hearing both the lay witnesses' descriptions of Mr. Cole's childhood and Dr. Wright's testimony about the degree to which Mr. Cole was emotionally and psychologically impaired as a result, would hardly have shared Respondent's dismissive view of the strength of that evidence.

C. Mr. Cole's evidence of neurological dysfunction was detailed and persuasive – indeed, it was far more substantial than the I.Q. score evidence ultimately found to require relief under *Penry* in *Tennard*.

Respondent continues to misrepresent the record with respect to Mr. Cole's neurological impairment. Respondent denigrates the evidence as showing only "a possible neurological dysfunction," RB 33, although admitting in a footnote that the district court's similar characterization of the evidence as "entirely insufficient to prove" such a disorder was rejected by the Fifth Circuit. RB 8 n.5.[5] In

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[4] Dr. Wright's testimony about Mr. Cole's impairment is consistent with *amici*'s observation that "children who are subjected to grave neglect" often suffer "emotional and developmental harm," as well as being "at increased risk for substantial mental illness." *See* Brief of *Amici Curiae* Child Welfare League of America, *et al.*, at 20-21 and accompanying notes.

[5] Respondent also argues that Mr. Cole's neurological dysfunction did not prevent him from "distinguish[ing] the difference between right and wrong," RB 36. That observation is surely irrelevant; *Penry*, too, involved a defendant whom a jury found capable of telling right from wrong, *see Penry*, 492 U.S. at 310, and in any event this Court long ago made clear that a defendant's mental impairment need not rise to the level of insanity in order to be constitutionally entitled to consideration as a mitigating factor. *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982).

fact, Mr. Cole's jury heard a qualified expert, Dr. Wright, testify that he had personally administered a battery of scientifically validated and generally accepted neuropsychological tests to Mr. Cole. They further heard Dr. Wright testify that he concluded that Mr. Cole's poor performance on those tests – scoring in the bottom five percent of the population on some – indicated that Mr. Cole suffered from central nervous system damage that impairs his impulse control. *See* JA 62-66, 70, 75-78. At oral argument in *Tennard*, when Respondent complained that the defense witness who offered Tennard's I.Q. score "had no idea who had given the test, [or] what kind of test was given, [or] when it was given," it was pointed out to Respondent that the State had every opportunity to challenge that evidence at trial, but did not do so. *See* Transcript of Oral Argument, *Tennard v. Dretke*, No. 02-10038, at 37-38. Precisely the same is true here. But just as in *Tennard*, Respondent now wants to dispute test results that were essentially uncontested at trial.

Dr. Wright's testimony about Mr. Cole's dismal test performance is precisely the type of scientific evidence that is routinely presented to demonstrate that an individual suffers from neurological or neuropsychological impairment; at the time of trial it was essentially the *only* type of testing available, short of post-mortem examination via autopsy, to indicate the presence of such dysfunction. *See* JA 78. Respondent's resistance to this evidence just reflects his categorical approach to *Penry*: because neurological impairment isn't mental retardation, it can't form the basis for relief. That argument does not survive *Tennard*; moreover, Tennard's own evidence of a 67 I.Q.

was based on a one-page document reflecting a single bare test score.[6] Such evidence pales next to Dr. Wright's detailed testimony about Mr. Cole's deficient performance on objective tests indicating neurological impairment.[7]

D. Mr. Cole's experts did not dispute that, as a result of his destructive childhood experiences, Mr. Cole was presently dangerous and would likely remain dangerous for "years" to come.

Respondent's defense of Mr. Cole's death sentence ultimately reduces to the claim that the defense experts' testimony provided jurors a vehicle for giving meaningful mitigating effect to Mr. Cole's deprived and neglected background, resulting mental and emotional disorders, and neurologically impaired impulse control. *See* RB 33-34. Both parties agree that Mr. Cole's experts did *not*

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[6] Tennard's jury heard no evidence whatsoever regarding what an I.Q. score meant or what a "normal" I.Q. was; nor any evidence about "when or where the I.Q. test was administered to [Tennard] or if more than one I.Q. test was administered"; nor any evidence about the I.Q. score's reliability or any "scientific or medical explanation of [Tennard]'s I.Q." *See* Joint Appendix, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002) at 73. In each of these ways, the testimony about Mr. Cole's neurological impairment was stronger, richer, and better developed than the mitigating evidence that ultimately required *Penry* relief in *Tennard*.

[7] Like the court below, Respondent suggests, without any support in the record, that Mr. Cole's neurological dysfunction *itself* would abate over time. *See* RB 36; *cf.* JA at 242 (comment by the Fifth Circuit that the evidence at Mr. Cole's trial "suggest[ed] that even someone with . . . an organic neurological deficiency changes later in life"). Even if Mr. Cole's psychodynamic disorders – his emotional and psychological problems – might diminish in intensity as the decades passed, nothing in the trial evidence indicated that the underlying *organic* condition contributing to Mr. Cole's impaired impulse control was likely to improve.

testify that the destructive effects of Mr. Cole's childhood deprivation and neglect were necessarily permanent. The real question is whether the experts' testimony made the "future dangerousness" question a reliable vehicle through which jurors could express the conclusion that, because of the destructive experiences Mr. Cole endured as a child and his resulting emotional and psychological impairment, a sentence less than death was appropriate. For two reasons, the answer must be "no."

First, as Mr. Cole explained in his opening brief, during voir dire the prosecutors instructed the jurors without qualification that they were obliged to answer the special issues literally, and warned them against undertaking any broader inquiry into Mr. Cole's culpability or considering the appropriateness of the sentence their factual "yes" or "no" answers to the "deliberateness" and "future dangerousness" questions would entail. *See* PB 19-21.[8] As a consequence, jurors came to the "future dangerousness"

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[8] Respondent suggests that *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*") discounts the importance of voir dire questioning in assessing jurors' likely understanding of their penalty-phase instructions, because of the time that passes between the two. *See* RB 39 n.14 (citing *Penry II*, 532 U.S. at 801). We think Respondent misreads *Penry II* on this point, but in any event the problem was exacerbated here by the fact that the prosecutor specifically *reminded* jurors at closing argument (which took place, after all, only two weeks after voir dire) that they had promised to answer the special issues "yes" if the State met its burden of proof – which the prosecutor had defined at voir dire as excluding "the particular aspects of the case," such as whether "a person had a bad upbringing." *See* PB 20-21. On this record, the voir dire questioning in combination with the prosecutor's closing argument amply supports a finding that the jurors did not understand themselves to be entitled to express in their answers to the "special issues" any broad conclusion about the appropriate sentence for Mr. Cole in light of all the evidence.

question having been inoculated against treating that issue as a vehicle for expressing a judgment about Mr. Cole's moral culpability in light of his background of deprivation and neglect.

More fundamentally, however, it is simply not a fair reading of the testimony of Mr. Cole's experts to suggest that they offered any view other than that Mr. Cole was presently dangerous and would continue to pose a threat of violence for years to come. Mr. Cole's experts straightforwardly acknowledged that he was presently dangerous:

> Q: – Do you feel he's a dangerous person?
>
> A: Yes.
>
> Q: Okay, and isn't it a fact that there's a probability that he would commit criminal acts of violence that would constitute a continuing threat to society in the future? Isn't that correct?
>
> A: I think that probability is stronger than for the rest of us, yes.

JA 81; *see also* JA 74 (if Mr. Cole "were released today on the street," he would present a "much greater probability of dangerous behavior than w[ould] the rest of us," and it would be "foolish to say otherwise"); JA 108-13 (in response to a "hypothetical" question from the prosecutor that tracked in detail the facts of Mr. Cole's crime and his background, defense expert Dr. Dickerson says he "would be concerned about the future danger of the person" described in the hypothetical, *i.e.*, Mr. Cole). Mr. Cole was thirty-one years old at the time of sentencing, and even so his experts predicted he would remain dangerous until "years from now." JA 74. The actual time frames that were mentioned – for example,

one expert said Mr. Cole might not "necessarily" be dangerous "five, ten, fifteen years from now," *see* JA 102 – all projected Mr. Cole's dangerousness to continue for a long time.[9] And if that were not enough, the *Fifth Circuit itself* earlier acknowledged that "[Mr.] Cole's own experts ... would not deny that he posed a risk of future dangerousness." PB 32 (citing *Cole v. Dretke*, 99 Fed. Appx. 523, 531-32 (5th Cir. 2004)). The same is true of the *convicting* court, which found on state habeas review that Mr. Cole's "own expert witnesses concurred that [he] was a man who showed a probability for future violence," JA 163, and that Mr. Cole's "own expert witnesses testified *at length* about the probability that [he] would be a danger to society." JA 165 (emphasis added). In short, there is ample reason to believe that a reasonable juror would have viewed the testimony of Mr. Cole's experts – even as they provided a mitigating explanation for Mr. Cole's violent propensities – as requiring a "yes" answer to the future dangerousness question. Thus, it simply flies in the face of this record to suggest that the testimony of Mr. Cole's experts somehow transformed the "future dangerousness" question into a vehicle within which his evidence could be given effect *as mitigating*.

[9] In this regard, Respondent's unqualified claim that Dr. Wright predicted that Mr. Cole would burn out "within ten years," *i.e.*, by age forty-one, *see* RB 5, is at best misleading. In support of this assertion, Respondent cites JA 68 and JA 73-74; the former page reflects Dr. Wright's testimony that comparable individuals "tend to begin to make changes at about forty, forty-five, fifty, somewhere in there." JA 68. The latter includes counsel's question about Mr. Cole's prospects for dangerousness "six, ten, twelve, twenty years from now," which elicited Dr. Wright's response that "I think we're looking at years from now." JA 73-74. Contrary to Respondent's claim, nowhere did Dr. Wright flatly predict that Mr. Cole would burn out "within ten years."

CONCLUSION

In opposing review in this Court, Respondent claimed that Mr. Cole's jury "concluded that nothing in his history – not his neurological impairment, not his absentee parents, not his childhood hardships – was sufficiently mitigating to warrant a life sentence for the murder." Respondent's Brief in Opposition at 1. But the record tells a different story. Mr. Cole's jurors were never asked whether the mistreatment Mr. Cole suffered as a child, or his serious mental disorders, were "sufficiently mitigating" to justify withholding the ultimate punishment. Instead, the jurors were told during voir dire that the law required them to put aside any views about the appropriate sentence in light of all the evidence, and answer solely whether the evidence about Mr. Cole's background raised a reasonable doubt as to the "deliberateness" of his crime or the likelihood of his future dangerousness. Given that context, *see* PB 19-24, neither of those questions provided the jury an adequate vehicle for considering and giving meaningful mitigating effect to Mr. Cole's background. As a result, Mr. Cole's death sentence violates *Penry*. This Court should reverse the Fifth Circuit and remand with instructions to grant habeas corpus relief.[10]

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[10] Mr. Cole still maintains that because he would be entitled to relief under the Fifth Circuit's recent decision in *Nelson v. Quarterman*, ___ F.3d ___, 2006 WL 3592953 (5th Cir. Dec. 11, 2006) (*en banc*), this Court could appropriately determine that it should remand his case to the Fifth Circuit for further review in light of *Nelson* rather than proceed to a full decision on the merits here. In this regard, Mr. Cole notes that Respondent's assertion that "the *en banc* Fifth Circuit's prior denial of rehearing in [Mr. Cole's] case implies that the *Nelson* majority does not view [Mr.] Cole's *Penry I* claim as equivalent to Nelson's," RB 36, is wildly speculative. *En banc* rehearing was granted *sua sponte* in *Nelson* on March 13, 2006. *En banc* rehearing in Mr. Cole's case was

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Respectfully submitted,

*ROBERT C. OWEN
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton
Austin, TX 78705
(512) 232-9391
(512) 232-9171 (facsimile)
**Counsel of Record for Petitioner*

RAOUL D. SCHONEMANN
3774 Harrison Street
Oakland, CA 94611
(510) 654-1192
(415) 904-5635 (facsimile)

JORDAN M. STEIKER
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton
Austin, TX 78705
(512) 232-1346
(512) 471-6988 (facsimile)

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denied just four days later, on March 17. Supplemental briefs were filed in *Nelson* on April 7 and May 3, oral argument followed on May 16, and the eventual *en banc* decision in *Nelson* was released December 11. Unless one assumes that every judge on the *en banc* Fifth Circuit knew how she was going to vote in *Nelson* four days after granting *en banc* rehearing in that case (*i.e.*, weeks before receiving the briefs, much less hearing oral argument), then the denial of *en banc* rehearing in Mr. Cole's case on March 17, 2006 cannot reasonably be taken to imply *any* view about the merits of Mr. Cole's *Penry* claim vis-à-vis Mr. Nelson's. This argument is as unpersuasive as Respondent's mischaracterization of the status of *Brewer* post-*Nelson*. Taken at its word, the Fifth Circuit's order denying *en banc* review expresses no substantive view about the effect of *Nelson* on *Brewer*. *See Brewer v. Quarterman*, 2006 WL 3787960 (5th Cir. 2006). Yet, Respondent would have the Court treat that order as reflecting a considered conclusion that *Nelson* leaves *Brewer* undisturbed. All that aside, Mr. Cole simply seeks the shortest path to obtaining relief from his unconstitutional death sentence, whether that lies in this Court or in the Fifth Circuit.